RECORD AND BRIEFS

Supreme Court, U.S.
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No. 15-577

In the
Supreme Court of the United States

TRINITY LUTHERAN CHURCH
OF COLUMBIA INC.,
Petitioner,

v.

SARA PARKER PAULEY, Director,
Missouri Department of Natural Resources,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR *AMICI CURIAE* DOUGLAS COUNTY SCHOOL DISTRICT AND DOUGLAS COUNTY SCHOOL BOARD IN SUPPORT OF PETITIONER

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INTRODUCTION AND STATEMENT OF INTEREST[1]

The Douglas County School Board ("Board") is charged by Article IX, §15 of the Colorado Constitution with "guid[ing] and manag[ing] both the action and practice of instruction as well as the quality and state of instruction" in the Douglas County School District ("District," or, together with the Board, "Douglas County"). *Bd. of Educ. of Sch. Dist. No. 1 in City & Cty. of Denver v. Booth*, 984 P.2d 639, 648 (Colo. 1999). In fulfillment of that charge, Douglas County established a comprehensive set of reforms designed to improve educational opportunity for Douglas County students that included a scholarship program to provide tuition assistance for qualified students to attend area private schools. The scholarships were both generally available and religiously neutral: Any Douglas County student meeting a one-year residency requirement could apply, and any qualifying student was free to use the scholarship money to attend a participating private school of his or her choice. No money went to any private school except by virtue of the independent decisions of students and parents.

Nevertheless, because some of the participating private schools are religiously affiliated, the Supreme

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[1] Pursuant to this Court's Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici curiae*, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to this Court's Rule 37.3, *amici* have obtained consent from respondent; petitioner has consented to the filing of all *amicus* briefs in a letter on file with the Clerk's office.

Court of Colorado enjoined the program on the ground that it violated Article IX, §7 of the Colorado Constitution—the Colorado Blaine Amendment. That provision has been in the Colorado Constitution since statehood and, true to its anti-Catholic roots, broadly prohibits the State from "mak[ing] any appropriation, or pay[ing] from any public fund or moneys whatever, anything in aid of any church or sectarian society, or for any sectarian purpose."

Douglas County filed a petition for a writ of certiorari on October 28, 2015, arguing that the Colorado Supreme Court's decision violated the Religion Clauses of the First Amendment and the Fourteenth Amendment. That petition is apparently being held for this case. Thus, although the *Douglas County* case, which involves an indirect aid program, is even more problematic, the Court's resolution of this case will materially affect Douglas County. Indeed, if the Court reverses the Eighth Circuit's decision here, the Court should grant, vacate and remand *Douglas County* so that the federal guarantee of religious neutrality can be restored in Colorado.

SUMMARY OF THE ARGUMENT

The Eighth Circuit construed this Court's decision in *Locke v. Davey*, 540 U.S. 712 (2004), to allow states with broadly worded Blaine Amendments to discriminate against religion in the administration of otherwise neutral and generally available government aid. In addition to improperly excluding religious persons and institutions from participating in government aid programs, the Eighth Circuit's decision puts local governments in an intolerable bind. Pursuant to state law, a local government must either

deviate from the federal guarantee of neutrality and discriminate against religious persons and institutions in conferring benefits, or defeat sound governmental objectives by withholding all aid to avoid the compelled discrimination. This is precisely the Hobson's choice created by the Colorado Supreme Court's decision in *Douglas County*, which held that Douglas County's neutral scholarship program violated the Colorado Blaine Amendment because some religiously affiliated schools would indirectly receive funding as a result of the intervening decisions of parents and students. The federal Constitution allows states and localities to accomplish legitimate objectives while steering a course of neutrality. It does not require governments to choose between discriminating or withholding benefits.

The Eighth Circuit's decision was flatly wrong. *Locke* authorized a limited departure from the rule of neutrality only in the very specific context of funding for the vocational theological training of clergy, and solely because of the unique Establishment Clause concerns such funding creates. Those concerns simply are not present in the context of funding to improve the safety of children's playgrounds.

The Colorado Supreme Court's application of *Locke* was even more erroneous. The scholarship program at issue in *Douglas County* involved only *indirect* aid in a context that this Court has already considered and held to be neutral and permissible. As in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), no money finds its way to any private school under the scholarship program except as a result of the intervening and truly independent decisions of

parents and students. This Court has already made clear that such a program raises no Establishment Clause concerns. The threat to neutrality instead comes from misguided decisions that would force a school district to sacrifice educational objectives and narrow educational opportunity by excluding religious schools.

Finally, both the Colorado and Missouri Blaine Amendments share discriminatory, anti-Catholic origins that make their contemporary use to compel religious discrimination particularly unacceptable. This Court has held that laws based on animus against a particular group are unconstitutional, and it has repeatedly recognized the anti-Catholicism that gave rise to the provisions at issue in this case and in *Douglas County*. *See Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion); *Zelman*, 536 U.S. at 721 (Breyer, J., dissenting). The anti-Catholic virulence that gave rise to the Colorado Blaine Amendment is particularly acute, and that provision has been neither amended, reenacted, nor reauthorized since its bigoted birth in 1876. Thus, whether in this case, or by eventually granting plenary review in *Douglas County*, this Court should ensure that provisions initially designed to discriminate against a single religion are not used to discriminate against all religions and interfere with the principles of neutrality that inform the federal Religion Clauses.

ARGUMENT

I. The Eighth Circuit's Reading Of *Locke* Forces Governments Either To Discriminate Based On Religion Or To Withhold Generally Available Benefits.

A. The Religion Clauses Demand Government Neutrality Between Religion and Nonreligion.

The basic command of the Religion Clauses of the First Amendment is neutrality. *See, e.g., Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). States may neither confer benefits on individuals or institutions because of their religious identity nor single them out for disfavored treatment. *See, e.g., Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 18 (1947) ("State power is no more to be used so as to handicap religions, than it is to favor them."). Neutrality extends not just to affirmative regulatory legislation, but also to government benefits decisions. *See, e.g., Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 114 (2001) ("For the 'guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse.'" (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 839 (1995)).

In *Locke*, this Court held that states could decline to fund vocational theological degrees for clergy. If *Locke* is a departure from the principle of neutrality, it is an extremely limited one. As explained in greater detail *infra*, *Locke* authorized discrimination only because of the unique history of, and concerns with,

government funding of devotional theological study by clergy and because the burden on the affected individuals was insubstantial. *Locke*, 540 U.S. at 722 n.5, 724-25.

Many lower courts, however, have read *Locke* as authorizing a far more substantial deviation from the basic guarantee of government neutrality toward religion. The Eighth Circuit's decision below is a prime example. The Eighth Circuit read *Locke* to authorize wholesale discrimination against religion in the administration of otherwise neutral and generally available aid programs. *See* Pet.App.10a-12a & n.3.

Reading *Locke* as broadly as the Eighth Circuit and Colorado Supreme Court read it places state and local governments in a serious bind. In states with constitutional provisions interpreted to forbid the extension of otherwise neutral and generally available aid to religious people or institutions, state and local governments cannot fund any public-private collaboration in the delivery of services without openly discriminating based on religion. Thus, a state that wishes to provide safer playground facilities for children is required to discriminate against religiously affiliated facilities and those who attend them, or not fund safe playgrounds at all. And, as the *Douglas County* case unfortunately demonstrates, a local government must exclude institutions from an otherwise neutral and generally applicable scholarship program, simply because they are deemed to have a religious affiliation. The notion that the Constitution is indifferent to this rank religion-based discrimination is untenable.

B. *Douglas County* Demonstrates the Difficult Position in Which Departures from Neutrality Have Placed State and Local Governments.

1. The Choice Scholarship Program

The *Douglas County* case highlights the quandary created by an overbroad reading of *Locke*. The facts of that case illuminate the issues in this case and the implications of what is at stake.

In June 2010, the District charged a task force with developing proposals to "improve choice for parents and students in the district." *Taxpayers for Pub. Educ. v. Douglas Cty. Sch. Dist. RE-1*, No. 11cv4427, at 2 (Colo. Dist. Ct. Aug. 12, 2011) ("Dist.Ct.Op."). After considering a wide range of options, the Board ultimately adopted a comprehensive program of educational reforms that included the Choice Pilot Scholarship Program ("Scholarship Program"). Dist.Ct.Op.4.

Modeled on the program approved by this Court in *Zelman*, the Scholarship Program was designed to "provide greater educational choice for students and parents to meet individualized needs, improve educational performance through competition, and obtain a high return on investment of [Douglas County School District] educational spending." Dist.Ct.Op.3. It provided monetary scholarships to the parents of qualifying students, who then used the funds to offset tuition at private schools that participated in the Scholarship Program. *Taxpayers for Pub. Educ. v. Douglas Cty. Sch. Dist.*, 351 P.3d 461, 464-65 (Colo. 2015). Students were eligible to participate if they resided in the District for at least a year and had been

enrolled in a District public school the previous year. *See* Dist.Ct.Op.4. A student who satisfied these criteria had to apply and be admitted into the Scholarship Program by the District, and also had to separately apply and obtain admission to the participating private school where the student wished to enroll. Dist.Ct.Op.4-5; *see also Taxpayers for Pub. Educ. v. Douglas Cty. Sch. Dist.*, 356 P.3d 833, 838 (Colo. App. 2013).

For each student admitted into both the Scholarship Program and a participating private school, the District issued a restricted check payable to the parents of the student. Dist.Ct.Op.3. The parents then endorsed the check to the participating private school in which their children were matriculating. *Douglas Cty.*, 356 P.3d at 839; Dist.Ct.Op.3. For the 2011-2012 school year, the Program provided families a scholarship of up to $4,575. *Douglas Cty.*, 351 P.3d at 465; Dist.Ct.Op.3.

Thirty-four private schools applied to participate in the Scholarship Program in its first year. The District accepted twenty-three applicants. *Douglas Cty.*, 356 P.3d at 838; Dist.Ct.Op.6. Of those twenty-three schools, sixteen have some affiliation with a religious organization; seven do not. *Douglas Cty.*, 356 P.3d at 838; Dist.Ct.Op.9 The Scholarship Program's materials expressly instruct families to investigate a participating private school's "admission criteria, dress codes and expectations of participation in school programs, be they religious or nonreligious" before applying or enrolling. Dist.Ct.Op.4.

No student is required to apply to or attend any particular private school, or even to apply to the

Scholarship Program; participation is wholly voluntary. Students who elect not to participate receive a free education at a District public school. *See Douglas Cty.*, 356 P.3d at 844.

2. Litigation in the Colorado State Courts.

As Douglas County began implementing the Scholarship Program, a group of parents and taxpayers sued Douglas County, the Colorado Board of Education, and the Colorado Department of Education. *Douglas Cty.*, 351 P.3d at 466 & n.7. They alleged, *inter alia*, that the Scholarship Program violated Colorado's Public School Finance Act of 1994, Colo. Rev. Stat. §22-54-101, and the Colorado Blaine Amendment.

Respondents moved for a preliminary injunction, and the district court held a three-day evidentiary hearing. Dist.Ct.Op.1. Along with other evidence, Douglas County introduced unrebutted expert testimony regarding the anti-Catholic origins of the failed federal Blaine Amendment and of its Colorado counterpart. *Douglas Cty.*, 351 P.3d at 485 (Eid, J., concurring in part and dissenting in part). Douglas County also expressly argued that using the Colorado Constitution to require it to discriminate on the basis of religion would violate the federal Constitution. Dist.Ct.Op.32-35.

Although the district court found the Scholarship Program to be "a well-intentioned effort ... to aid students and parents, not sectarian institutions," Dist.Ct.Op.39, 44, it nevertheless held that the Scholarship Program violated the Public School Finance Act and the Colorado Blaine Amendment. In

determining that the Program violated the Colorado Blaine Amendment, the district court concluded that some of the participating private schools were "sectarian or religious." Dist.Ct.Op.36. It did so by exhaustively combing through their curricula, scrutinizing the composition of their governing bodies and funding sources, and scouring the schools' admission criteria for signs that they "tend to indoctrinate and proselytize" according to "religious beliefs or practices." Dist.Ct.Op.9-12. The court then concluded that "any funding of the private schools, even for the sole purpose of providing education, would further the sectarian purpose of religious indoctrination within the schools [sic] educational teachings" and therefore violate the Colorado Blaine Amendment. Dist.Ct.Op.40. The district court also held that applying §7 to require Douglas County to discriminate against religion would not violate the federal Constitution. Dist.Ct.Op.32-35.

The Colorado Court of Appeals reversed. It held that respondents lacked standing to bring their Public School Finance Act challenge. *Douglas Cty.*, 356 P.3d at 840. On the merits, it concluded that the Scholarship Program does not violate the Colorado Blaine Amendment.

The court criticized the district court's searching inquisition of the beliefs and practices of the participating private schools, including "the degree to which those schools 'infuse religious teachings into the curriculum.'" *Id.* at 848 (quoting Dist.Ct.Op.45). It observed that this Court has rejected such doctrinal inquiries as an impermissible means to answer a constitutional question and an unconstitutional end in

themselves. *Id.* at 849. The court further noted that the Scholarship Program was "facially neutral toward private religious schools because it is open to all private schools." *Id.* at 850. It concluded that because the Scholarship Program "is neutral toward religion generally and toward religion-affiliated schools specifically," construing the Colorado Blaine Amendment to require exclusion of religiously affiliated schools from such "otherwise neutral and generally available government support" was "forbidden by the First Amendment." *Id.*

A deeply divided Supreme Court of Colorado granted review and reversed. Six of the Court's seven Justices held that respondents lacked standing to bring their Public School Finance Act challenge. *Douglas Cty.*, 351 P.3d at 466-69; *id.* at 480 n.1 (Eid, J., concurring in part and dissenting in part). Three of those Justices further held that the Scholarship Program violates the Colorado Blaine Amendment, and that the Amendment, as so employed, does not violate the federal Constitution. *Id.* at 469-75. The other three Justices disagreed, concluding that the Scholarship Program does not violate the Colorado Blaine Amendment and that holding otherwise raises grave concerns under the federal Constitution. *Id.* at 479-86 (Eid, J., concurring in part and dissenting in part). The seventh Justice found that the plaintiffs had standing to challenge the program under the Public School Finance Act and concluded that the Scholarship Program violated that act. *Id.* at 475-79 (Marquez, J., concurring in the judgment). With four Justices joining the judgment—a dispositive plurality doing so on Blaine Amendment grounds—the court enjoined the Scholarship Program.

3. Douglas County's Petition for a Writ of Certiorari

On October 28, 2015, Douglas County petitioned this Court for a writ of certiorari. *See* Pet., *Douglas Cty. Sch. Dist. v. Taxpayers for Public Educ.* (No. 15-557).[2] Douglas County argued that the Colorado Blaine Amendment was a virulently anti-Catholic state constitutional amendment designed to choke off public funding for Catholic, or "sectarian" schools, in the 1870s. It explained at length how anti-Catholic sentiment after the Civil War nearly led to the enactment of an amendment to the U.S. Constitution forbidding public funding of "sectarian" schools. Pet.5-8 (No. 15-557). When that amendment narrowly failed, dozens of states enacted their own versions. *Id.* at 8. Douglas County, relying on historical sources and on unrebutted testimony presented during the preliminary injunction hearing, explained how the Colorado Blaine Amendment—unamended and never reauthorized since its passage—is the quintessential example of a state Blaine Amendment. *Id.* at 8-11. Douglas County argued that this Court has long held that facially neutral laws that are products of animus are unconstitutional, and that fact alone required reversal of the Colorado Supreme Court's judgment.

Douglas County further argued that the Colorado Supreme Court's decision deepened an existing split on the scope of this Court's decision in *Locke*, 540 U.S. 712. While the Tenth and Seventh Circuits have interpreted *Locke* not to authorize wholesale

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[2] The State of Colorado and a group of parents who intervened as defendants below also separately petitioned for writs of certiorari. *See* Nos. 15-556, 15-558.

discrimination against religious organizations in the administration of otherwise neutral and generally available aid, the Colorado Supreme Court joined the First Circuit and the Eighth Circuit (in this case) in holding that it did. *See* Pet.25-34 (No. 15-557). Douglas County argued that *Locke* itself, as well as other Free Exercise Clause precedents and other constitutional decisions, made clear that *Locke* permitted the state to withhold otherwise neutral and generally available aid only from the vocational theological instruction of clergy. Reading *Locke* to authorize anything more would essentially unravel this Court's longstanding commitment to neutrality and undermine antidiscrimination principles enshrined in the First and Fourteenth Amendments.

At bottom, the petition argued, decisions like those by the Colorado Supreme Court and the Eighth Circuit impermissibly force governments like Douglas County to take one of two untenable approaches: Discriminate against religion in the administration of generally available aid, or decline to extend such aid to anyone. The Constitution does not put governments to this intolerable choice.

II. The Eighth Circuit's Decision In *Trinity Lutheran* Is Wrong, And Its Extension To Indirect Aid Programs Approved By This Court Is Even More Wrong.

A. The Eighth Circuit's Decision Is Deeply Flawed and Should Be Reversed.

The Eighth Circuit held that using the Missouri Blaine Amendment to deny a religiously affiliated daycare's application for a safer playground surface passed federal constitutional muster by relying on this

Court's summary affirmance in *Luetkemeyer v. Kaufmann*, 364 F. Supp. 376 (W.D. Mo. 1973), *aff'd*, 419 U.S. 888 (1974), and its decision in *Locke*. In doing so, the Eighth Circuit committed plain error. *Luetkemeyer* is wholly inapposite, and the Eighth Circuit fundamentally misunderstood *Locke*.

In *Luetkemeyer*, Missouri officials interpreted the state's busing statutes and its Blaine Amendment to "prohibit[] the transportation at public expense of children to and from a non-public school." *Luetkemeyer*, 364 F. Supp. at 379. The parents of children attending a Roman Catholic private school contended that the Constitution required Missouri to provide the same sort of busing system for private-school students as it did for public-school students. *Id.* at 377. The three-judge district court rejected the challenge, holding that the state was under no obligation to fund *private* schools—both religious and nonreligious, *see id.* at 387—simply because it funded *public* schools, *see id.* at 382 (quoting *Norwood v. Harrison*, 413 U.S. 455, 462 (1973)). This Court affirmed without opinion. *Luetkemeyer v. Kaufmann*, 419 U.S. 888 (1974). Justice White, joined by Chief Justice Burger, dissented, arguing that because the case presented an important Free Exercise Clause question, the Court should have noted probable jurisdiction and heard argument. *Id.* at 890 (White, J., dissenting).

In this case, the Eighth Circuit majority concluded that because *Luetkemeyer* had rejected at least one Free Exercise Clause challenge, the Missouri Blaine Amendment could not possibly be *facially* unconstitutional. Pet.App.8a-9a. There are, of course,

two obvious problems with that holding. First, and most obviously, Trinity Lutheran did not bring a facial challenge here. As Judge Gruender explained, petitioner's challenge was plainly limited exclusively to the state's denial of its application. Pet.App.23a-25a. Indeed, petitioner's complaint bears this point out. *See, e.g.*, Pet.App.106a (challenging state's "unconstitutional application of [the Missouri Blaine Amendment] in denying the [petitioner]'s grant application"). The panel majority's eagerness to construe the complaint as mounting a facial challenge that Trinity Lutheran did not bring gets matters backwards. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450-51 (2008); *see also, e.g., Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329 (2006); *Renne v. Geary*, 501 U.S. 312, 324 (1991). Second, a single constitutional application of a provision motivated by improper animus, particularly where animus was neither raised nor addressed, would not preclude a facial challenge that focuses on its improper animus. The fact that an improperly motivated statute or constitutional provision is capable of benign application does not prevent a successful attack, whether facial or as-applied, on the basis of its improper motivation. *Cf. Johnson v. United States*, 135 S. Ct. 2551, 2560-61 (2015) (holding that facial constitutional attack is not defeated simply because statute may constitutionally be applied to some conduct); *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993) (holding that statute constitutionally prohibiting some conduct is nevertheless unconstitutional when "it functions ... to suppress" religious practices).

Quite apart from the majority's errors concerning facial challenges, its fixation on *Luetkemeyer* is misplaced. The challenge in *Luetkemeyer* was premised on the notion that because the government provided a particular benefit—busing—to those who availed themselves of a particular public service—public schooling—it must also provide that same benefit to those who, like the plaintiffs' children, did not so avail themselves. *See Luetkemeyer*, 364 F. Supp. at 381-82. There was no allegation of government discrimination between private actors. Rather, the plaintiffs alleged discrimination between those who use a government benefit, and those who do not. Thus, *Luetkemeyer* is irrelevant to this case because the transportation services at issue there were not provided to *any* private school or institution. The only "discrimination" was between public schools and private schools, not between religious and secular private schools.

Petitioner's challenge in this case is far less grandiose. It contends only that when the government elects to provide neutral and generally available benefits to some private actors, it cannot be forced to deny those same benefits to others simply on the basis of their religion. *Luetkemeyer* has nothing to say on that question. Perhaps for that straightforward reason, respondent did not rely upon *Luetkemeyer* below. *See* Pet.App.24a (Gruender, J., concurring in part and dissenting in part). The majority divined the supposed relevance of that case on its own—a red flag that the case's relevance was vastly overstated.

Although the majority failed to "fully grappl[e] with" it, *see* Pet.App.23a (Gruender, J., concurring in

part and dissenting in part), *Locke* is ultimately the precedent on which the majority's opinion rises or falls. The majority read *Locke* to support its ruling that there "'are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause.'" Pet.App.12a n.3 (quoting *Locke*, 540 U.S. at 719). Whatever those actions are, *Locke* did not consign states to being forced to choose between tolerating less safe playgrounds or compelled discrimination against religion. There is, to say the least, a material difference between state funding of theology degrees and state funding of safe playgrounds.

Locke involved a higher-education scholarship program pursuant to which the state provided college scholarships to qualifying students, but prohibited using the scholarships for theology degrees. 540 U.S. at 715-17. The Court held that, although the state was free to allow scholarship recipients to use the funds for theology degrees without violating the Establishment Clause, *id.* at 718-19, the Free Exercise Clause did not compel it to do so. The Court identified a tradition against "procuring taxpayer funds to support church leaders" dating to "the founding of our country." *Id.* at 722. Moreover, the Court held that the scholarship limitation imposed only a "relatively minor burden on" scholarship recipients, who remained free to use the scholarships to attend religiously affiliated schools and to take theology courses. *Id.* at 724-25.

Justice Scalia dissented. He warned that the Court's decision lacked any "logical limit" and could be deployed to "justify the singling out of religion for

exclusion from public programs in virtually any context." *Id.* at 730 (Scalia, J., dissenting).

The Chief Justice's response to Justice Scalia's dissent clarified just how limited was *Locke*'s holding. The Chief Justice explained that the decision was limited to the use of scholarships toward theology degrees because "the *only* interest at issue here is the State's interest in not funding the religious training of clergy." *Id.* at 722 n.5 (emphasis added). The Court explained the importance of that interest by highlighting the distinct concerns raised by state funding of religious training of clergy. "Training someone to lead a congregation is an essentially religious endeavor," a "distinct category of instruction" that is "akin to a religious calling" and different from "education for other callings." *Id.* at 721. There was a centuries-old tradition against public funding of such training, including that "[m]ost States" had "formal prohibitions against using tax funds to support the ministry." *Id.* at 723. The Court in *Locke* applied that longstanding concern about direct government funding of the core religious functions of the church itself to the specific context of higher education.

Finally, the Court observed that the law evinced no "hostility toward religion," but in fact went "a long way toward including religion in its benefits," including allowing public funding for theology courses, but not majors, at religious schools. *Id.* at 724. The burden on those desiring to study theology was thus "relatively minor." *Id.* at 725.

None of these concerns is present in this case. Including petitioner in the Scrap Tire Grant Program

would hardly have been a religious endeavor akin to teaching someone how to lead a congregation. The Eighth Circuit identified no tradition against including church playgrounds in otherwise neutral and generally available safety subsidies, apart from the very law being challenged. In-kind assistance to protect the safety of children is entirely secular. And unlike the scholarship program in *Locke*, the burden on religion is substantial: Petitioner is entirely excluded from the program, whereas the challenger in *Locke* was still free to take religion courses at religious educational institutions. *See id.* at 724-25. The Eighth Circuit's holding simply cannot be squared with either the limited rationale of *Locke* nor with the general principle of neutrality pervading Religion Clauses jurisprudence.

Not every court has so erroneously overread *Locke*. The Tenth Circuit, for example, observed that *Locke* "indicated that the State's latitude with respect to funding decisions has limits." *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1255 (10th Cir. 2008). In particular, *Locke* "suggests, even if it does not hold, that the State's latitude to discriminate against religion ... does not extend to the wholesale exclusion of religious institutions and their students from otherwise neutral and generally available government support." *Id.* The *Colorado Christian* court rejected the argument that, following *Locke*, "all 'state decisions about funding religious education'" are permissible so long as they are rational. *Id.* at 1254-55. And it went on to hold that Colorado could not bar "pervasively sectarian" institutions from receiving aid under a neutral and generally available college scholarship program. *Id.* at 1256.

Similarly, the Seventh Circuit in *Badger Catholic, Inc. v. Walsh*, 620 F.3d 775 (7th Cir. 2010), noted that the program in *Locke* allotted state funds for use "at pervasively sectarian colleges, where prayer and devotion were part of the instructional program; only training to become a minister was off limits." *Id.* at 780. In the case before it, the court concluded from the fact that the state refused to "support programs that include prayer or religious instruction" that the state "evince[d] hostility to religion." *Id.*

Of course, the Eighth Circuit and Colorado Supreme Court are not alone in their expansive interpretations of *Locke*. *See Eulitt ex rel. Eulitt v. Maine*, 386 F.3d 344, 355 (1st Cir. 2004) (declining "to cabin *Davey* ... to the context of funding instruction for those training to enter religious ministries"); *Bush v. Holmes*, 886 So. 2d 340 (Fla. Dist. Ct. App. 2004) (striking down a neutral and generally available scholarship program as providing impermissible aid to religious schools), *aff'd on other grounds*, 919 So. 2d 392, 398 (Fla. 2006). And the confusion surrounding *Locke* has not gone unnoticed in the academy. *See, e.g.*, Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 Harv. L. Rev. 155, 183-95 (2004); Thomas C. Berg, Response, *Religious Choice and Exclusions of Religion*, 157 U. Pa. L. Rev. PENNumbra 100, 108-09 (2008); *see also* Cleland B. Welton II, Note, *The Future of* Locke v. Davey, 96 Va. L. Rev. 1453, 1469 (2010) ("The Court's scattershot opinion leaves the future of the doctrine uncertain.").

Whatever confusion may exist about *Locke*'s holding should be resolved by the Religion Clauses' command of neutrality. *Locke* authorized discrimination only in the presence of specific, distinctive circumstances: The unique situation appertaining to the "vocational religious instruction" of clergy, which *Locke* concluded was "akin to a religious calling" and different from "education for other callings," 540 U.S. at 721, 725; the well-established tradition dating back to the Founding of withholding state funding for the "vocational religious instruction" of clergy, *id.* at 725; and the absence of hostility toward religion—and, indeed, affirmative steps towards its inclusion—in the law, making the burden on free exercise "relatively minor," *id.* at 724-25. In the absence of these circumstances, there is no warrant to depart from the most basic command of the Religion Clauses: The government may neither confer nor withhold benefits *because* of religion. The contrary reading of *Locke*—allowing almost unlimited discrimination against religion in the administration of otherwise neutral and generally available government aid—is not the "'play in the joints' between" the Free Exercise and Establishment Clauses that *Locke* described, *id.* at 718; it is a complete break from our constitutional commitment to neutrality as reflected in multiple constitutional provisions.

First, the Establishment Clause not only prohibits discrimination among religions, *see Larsen v. Valente*, 456 U.S. 228, 244 (1982), but also guards against "trolling through a person's or institution's religious beliefs," *Mitchell*, 530 U.S. at 828 (plurality opinion); *see also Rosenberger*, 515 U.S. at 844; *NLRB*

v. Catholic Bishop of Chi., 440 U.S. 490, 502 (1979). The federal courts of appeals have thus repeatedly held that the Establishment Clause "protects religious institutions from governmental monitoring or second-guessing of their religious beliefs and practices" in connection with "exclusion from benefits." *Colo. Christian*, 534 F.3d at 1261; *see also Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1340-42 (D.C. Cir. 2002); *Columbia Union Coll. v. Oliver*, 254 F.3d 496, 501-04 (4th Cir. 2001). The Eighth Circuit's reasoning, however, authorizes that very inquiry, since a government could not very well decide which potential recipients of otherwise neutral and generally applicable government aid are "sectarian" within the meaning of the Missouri Blaine Amendment without an inquiry into the recipient's beliefs, practices, structure, and activities. Not every potential recipient will have the word "church" in its name.

Second, laws "involving discrimination on the basis of religion ... are subject to heightened scrutiny" under the Equal Protection Clause. *Colo. Christian*, 534 F.3d at 1266. They are permissible only if narrowly tailored to further a compelling governmental interest. *E.g.*, *Johnson v. California*, 543 U.S. 499, 505 (2005). Interpreting the Missouri Blaine Amendment to require the exclusion of religious people and institutions from receiving otherwise neutral and generally available aid plainly is "discrimination on the basis of religion" that is not narrowly tailored to further any compelling governmental interest. The only possible interest justifying such an infringement—and the only one identified by the Eighth Circuit majority—is an antiestablishment interest, but the lower court's

treatment of the First Amendment question both *engenders* establishment concerns by authorizing an inquisition into an aid recipient's religious beliefs, and departs from the neutrality principles underlying the federal Establishment Clause. The Missouri provision in question does not ameliorate a potential Establishment Clause problem; it creates one.

B. The Colorado Supreme Court's Invalidation of an Indirect Aid Program Materially Indistinguishable from the Program Upheld by this Court in *Zelman* Underscores the Threat to Neutrality.

The Colorado Supreme Court's decision in *Douglas County* underscores that the mistaken logic unleashed by an overreading of *Locke* is not easily cabined. Not content to compel discrimination in the context of direct aid, the Colorado Supreme Court did the Eighth Circuit one better and compelled discrimination in the context of indirect aid—of a neutral government program in which no moneys reach religious schools except by virtue of the intervening and independent choices of parents and students.

The Eighth Circuit's decision is plainly wrong even in the context of direct aid, but the Colorado Supreme Court's invalidation of the Scholarship Program on similar reasoning underscores the threat to the broader constitutional commitment to neutrality. This Court has repeatedly emphasized that the presence of intervening and independent decisions as a "circuit breaker" between government funding and religious institutions is a particularly

powerful "way of assuring neutrality." *Mitchell*, 530 U.S. at 810 (plurality opinion). If "numerous private choices, rather than the single choice of a government, determine the distribution of aid pursuant to neutral eligibility criteria, then a government cannot, or at least cannot easily, grant special favors that might lead to a religious establishment." *Id.* (quotation marks omitted). Furthermore, "[p]rivate choice also helps guarantee neutrality by mitigating the preference for pre-existing recipients that is arguably inherent in any governmental aid program and that could lead to a program inadvertently favoring one religion or favoring religious private schools in general over nonreligious ones." *Id.* (citation omitted)

An unbroken string of cases supports these principles. *See, e.g.*, *Mueller v. Allen*, 463 U.S. 388, 392 (1983); *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 484 (1986); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 4-5 (1993); *Agostini v. Felton*, 521 U.S. 203, 225-26 (1997).

Most recently, of course, the Supreme Court held in *Zelman* that a school choice program substantively identical to the Scholarship Program complies with the Establishment Clause. The program in *Zelman* provided aid directly to parents of qualifying students to be used to cover tuition at a private school of their choice without regard to the religious identity of the school. 536 U.S. at 646-47. Ninety-six percent of aid recipients attended religious schools, and eighty-two percent of participating private schools had a religious affiliation. *Id.* at 647. The Court held that, "where a government aid program is neutral with respect to religion, and provides assistance directly to a broad

class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause." *Id.* at 652.

The Scholarship Program is substantively identical to—in fact, modeled after—the program in *Zelman*. It is equally neutral when it comes to religion. Religiously affiliated schools do not provide only, or even primarily, religious instruction. They teach a full secular curriculum and satisfy the state's compulsory education requirements, which is precisely why they have been included in a neutral government program. *See, e.g., Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236, 245-47 (1968). And, indeed, all private schools that applied to the Program were evaluated solely on whether they could provide a quality education, without regard to religion. *See Douglas Cty.*, 356 P.3d at 850 (noting that the Scholarship Program "is neutral toward religion generally and toward religion-affiliated schools specifically"). Under the Program, all participating private schools had to produce student achievement and growth results for scholarship recipients at least as strong as the District's public schools.

The Scholarship Program thus poses none of the dangers at issue in *Locke*. Whereas giving the petitioner in *Locke* his scholarship could be viewed as exclusively or primarily funding a religious function, the Scholarship Program indisputably funds the education of children in state-mandated secular subjects, in either a secular or religious environment,

as the children and their parents choose. That is fully consistent with the Establishment Clause, and this Court has refused to countenance encroachments upon some other constitutional protection when "the posited fears of an Establishment Clause violation are unfounded." *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395 (1993); *see also Widmar v. Vincent*, 454 U.S. 263, 271-72, 276 (1981).

None of this is to suggest that there is any Establishment Clause danger posed by the Scrap Tire Grant Program. That Program has its own guarantees of neutrality, and saying that all playgrounds can benefit from the Program, except those provided by religious entities, is a significant departure from a commitment to wholesome neutrality. But the Colorado Supreme Court decision in *Douglas County* demonstrates that once *Locke* is read to sanction discrimination against religion outside the narrow context of government funded theological degrees, there is no logical stopping point. Whereas the intervening and independent role of parents and students was an important guarantee of neutrality in the view of this Court, it was immaterial in the eyes of the Colorado Supreme Court in *Douglas County*. This Court should put this pernicious genie back in the bottle here, reverse the Eighth Circuit, and ultimately grant, vacate and remand in *Douglas County*. But if this Court declines to resolve the issue here, it should ultimately make clear that states and localities cannot be forced to discriminate against

religion in the context of indirect neutral aid programs.[3]

III. Pervasive Anti-Catholicism Underlies Both Blaine Amendments.

Underlying both Article I, §7 of the Missouri Constitution and Article IX, §7 of the Colorado Constitution is the virulent anti-Catholic animus that dominated American domestic politics in the decade following the Civil War. Both provisions are products of that bias.

The enactment history of the provisions matters and is itself grounds for reversal. This Court has repeatedly held that laws singling out a group for mistreatment on the basis of animus toward that group violates the Constitution. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620, 632 (1996) (provision of Colorado Constitution "inexplicable by anything but animus toward the class it affects" lacks a rational basis); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985) ("mere negative attitudes, or fear" cannot justify legislation targeting a particular group); *Hunter v. Underwood*, 471 U.S. 222, 227 (1985) (striking down facially neutral provision of Alabama constitution on ground that enactment history revealed that its enactment was tainted by racial animus); *cf. Palmore v. Sidoti*, 466 U.S. 429, 433

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[3] *Douglas County* illustrates the dangers inherent in the Eighth Circuit's approach in one additional respect. While the Eighth Circuit's reasoning created an inchoate danger of searching inquiries into the depth of religious commitment or the pervasiveness of religious values, that inchoate threat was realized in the district court proceedings in the *Douglas County* case. Dist.Ct.Op.9-12; *Douglas Cty.*, 356 P.3d at 848.

(1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."). In *Church of the Lukumi Babalu Aye*, for example, this Court struck down a local ordinance forbidding animal sacrifices as the product of discrimination against a particular religious group. 508 U.S. at 534-35. Although bias did not appear on the face of the statute, this Court held that "[f]acial neutrality is not determinative" and looked behind the text to the ordinance's enactment history for evidence of religious targeting or "covert suppression of particular religious beliefs." *Id.* at 534 (quotation marks omitted). And in *Locke*, this Court affirmed that "hostility toward religion" renders a refusal to fund constitutionally suspect. 540 U.S. at 724.

A. The Federal Blaine Amendment

From the Nation's founding until the mid-nineteenth century, Protestantism enjoyed unrivaled dominance over the nation's religious and civic landscape. A general Protestant morality was widely seen as a necessary prerequisite to the maintenance of the American constitutional republic. *See* Frederick Mark Gedicks, *Reconstructing the Blaine Amendments*, 2 First Amend. L. Rev. 85, 91-92 (2003). "Many people viewed Protestantism as inseparable from the American republican idea," Stephen Macedo, *Diversity and Distrust: Civic Education in a Multicultural Democracy* 57 (2000), even as synonymous with "Americanism," John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 Mich. L. Rev. 279, 297 (2001) (quotation marks omitted).

Protestant hegemony was particularly evident in American education. The first publicly funded school systems—the common schools—served as important tools for inculcating civic Protestant values in their students. Noah Feldman, *Non-Sectarianism Reconsidered*, 18 J.L. & Pol. 65, 72-73 (2002). At a time when conservative and liberal Protestants disagreed on fundamental theological questions, the common schools' curricula "evidenced a 'pan-Protestant compromise, a vague and inclusive Protestantism' designed to tranquilize conflict among Protestant denominations." Kyle Duncan, *Secularism's Laws: State Blaine Amendments and Religious Persecution*, 72 Fordham L. Rev. 493, 503 (2003) (quoting Jeffries & Ryan, *supra*, at 299). This curriculum was denominated "nonsectarian." But it certainly was not secular. Its centerpiece was reading from a Protestant version of the Bible, *see* Joseph P. Viteritti, *Blaine's Wake: School Choice, The First Amendment, and State Constitutional Law*, 21 Harv. J.L. & Pub. Pol'y 657, 666 (1998), and it also included prayers and hymns while "simultaneously refus[ing] to allow more particularized kinds of religious instruction," Christopher C. Lund, *The New Victims of the Old Anti-Catholicism*, 44 Conn. L. Rev. 1001, 1006 (2012). Nonsectarian education was therefore a form of Protestant religious education. *Id.*

This homogenized, "nonsectarian" Protestantism necessarily excluded Roman Catholicism. Many Protestants believed that their new nation's greatness lay in its rejection of the superstitious customs and traditions of the Old World. *See* Macedo, *supra*, at 59-61. They regarded Catholicism as part of that discarded Old World, and the Catholic Church as a

corrupt and loathsome foreign power. *See* Richard W. Garnett, *The Theology of the Blaine Amendments*, 2 First Amend. L. Rev. 46, 63-64 (2003); Philip C. Hamburger, *Separation of Church and State* 232-36, 436 n.112 (2002).

The wave of Catholic immigration beginning in the mid-nineteenth century brought these prejudices to the fore. *See* Hamburger, *supra*, at 201-02. Unsurprisingly, Catholics frequently refused to simply accept the openly Protestant instruction dominating the common schools. Protestants saw the Catholic refusal to participate in "nonsectarian" public school practices like Bible reading, hymn singing, and prayer as a failure to assimilate and a rejection of core values of American civic culture. *See id.* at 211; Charles L. Glenn, *The American Model of State and School* 154-60 (2012). Catholics established their own parochial schools and tried to break the monopoly on state funding for Protestant education by lobbying for a share of common school funds. *See* Steven K. Green, *The Blaine Amendment Reconsidered*, 36 Am. J. Legal Hist. 38, 42 (1992). Although initially rebuffed, Catholics were gradually able to gain access to funding for parochial schools or excise Protestant practices from public schools in cities with large Catholic populations. *Id.* at 44-47.

These efforts were met frequently with a prejudice and nativism endemic of the broader anti-Catholic brand of politics that had emerged in response to swelling Catholic numbers. *See generally* Hamburger, *supra*, at 201-40; *see also* Jeffries & Ryan, *supra*, at 301. These politics reached a fevered pitch after the Civil War. In 1875, President Grant

delivered an address denouncing the forces of "superstition" and calling for citizens to "resolve that not one dollar ... be appropriated to the support of any sectarian schools." Duncan, *supra*, at 507 (quotation marks and emphasis omitted). The reference to "sectarian schools" had an unmistakable public meaning to Grant's audience. It meant Catholic—the antithesis of the "nonsectarian" Protestant public schools of the era. *See* Jeffries & Ryan, *supra*, at 301; Hamburger, *supra*, at 298-99, 307; *cf. Mitchell*, 530 U.S. at 828 (plurality opinion); *Zelman*, 536 U.S. at 721 (Breyer, J., dissenting); Richard A. Baer, Jr., *The Supreme Court's Discriminatory Use of the Term "Sectarian,"* 6 J.L. & Pol. 449 (1990). Grant's nonsectarianism was not an appeal to build a high wall of separation between church and state—its proponents were only too happy to maintain funding for "nonsectarian" (*i.e.*, Protestant) public schools—but simply reflected an interest in discriminating against Catholic practices and institutions.

Grant also called for a constitutional amendment forbidding funding for "sectarian" schools. Steven K. Green, *The Bible, the School, and the Constitution* 192-93 (2012). Shortly thereafter, Representative James Blaine of Maine obliged and introduced an amendment, which read in relevant part:

> [N]o money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect; nor shall any money so raised or lands so devoted be

> divided between religious sects or denominations.

4 Cong. Rec. 205 (1875). The House approved the amendment, but it died in the Senate as Senators opposing it assailed its patently anti-Catholic purpose and effect. Green, *Blaine Reconsidered*, *supra*, at 39.

B. The Blaine Amendments in the States

As Blaine's Amendment failed in Congress, advocates of such measures turned to the states. Within a year of its defeat, fourteen states had adopted measures forbidding public funding for "sectarian" schools, and thirty states had adopted such provisions by the 1890s. Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 Harv. J.L. & Pub. Pol'y 551, 573 (2003). Among them were Colorado and Missouri.

1. Colorado's Blaine Amendment

As set forth in the unrebutted factual record in the *Douglas County* case, Colorado's constitutional convention opened in December 1875, the same month that President Grant called for a constitutional amendment and Representative Blaine answered his call. Tr.670:23-671:05; Green, *Blaine Reconsidered*, *supra*, at 52-53.[4] The state's Catholic population—which, unlike the Protestant majority, was heavily Mexican-American—was wildly underrepresented at the convention, which was held in the Denver lodge of a secret society that refused to admit Catholics. *See Proceedings of the Constitutional Convention Held*

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[4] "Tr." refers to the transcript of the evidentiary hearing before the district court in *Douglas County*.

in Denver, December 20, 1875 to Frame a Constitution for the State of Colorado 15 (1907) ("*Proceedings*"); Glenn, *supra*, at 170-71; Tr.671:17-21, 676:7-677:8.

The Convention moved quickly to address the school funding question. *See* Tr.672:10-14. As some delegates expressed concern that Congress might not admit Colorado to the union if the convention failed to prohibit funding of "sectarian" schools, *see Proceedings* at 278; Tr.691:6-16, former territorial governor John Evans petitioned the Convention on behalf of a group of Protestant churches to keep public schools "free from sectarian" influence, prohibit diversion of funds to Catholic schools, and allow Bible reading in public schools, *see Proceedings* at 87, 111-13, 277; Tr.679:5-680:25.

The future first Catholic bishop of Denver called for leaving the "question of separate schools and denominational education" to future legislative judgment, "when the passions of th[e] hour will have subsided." *Proceedings* at 235, 330-31; *see also* Glenn, *supra*, at 172-73. These comments—hardly unreasonable—sparked a furious reaction and laid bare the anti-Catholicism which pervaded the convention. *See* Glenn, *supra*, at 170 ("That prejudice existed among the Protestant majority there can be no doubt."). Former governor Evans noted privately that the remarks gave him an opening to "stir ... up" the anti-Catholic elements of the majority, Donald W. Hensel, *Religion and the Writing of the Colorado Constitution*, 30 Church Hist. 349, 352 (1961), and the press railed against Catholic influence in Colorado's educational and political systems, *see* Glenn, *supra*, at 171 (quoting *Rocky Mountain News*, Jan. 11, 1876);

id. at 172 (quoting *Boulder County News*, Jan. 21, 1876); *see also* Hensel, *supra*, at 356.

Ultimately, the convention adopted the Colorado Blaine Amendment. Of the eight Catholic delegates who participated in the Convention, *none* voted in favor of the Amendment. *See* Hensel, *supra*, at 353-54; *Proceedings* at 357-58. A Denver newspaper praised the Convention's decision to adopt "'Mr. Blaine's amendment'" which had "'struck a chord in the average American breast that has not yet ceased vibrating'" such that "'far more protestants can be got to vote for the constitution on account of this very clause than catholics for the same reason to vote against it.'" Glenn, *supra*, at 173 (quoting *Rocky Mountain News*, Mar. 17, 1876). Article IX, §7 has not been amended, reenacted, or reauthorized since 1876, and the taint of the animus that fueled its enactment remains unmitigated.

2. Missouri's Blaine Amendment

Missouri was hardly immune from the anti-Catholic politics which held the federal capital and Denver in thrall. Following the elections of 1854, for example, rabidly anti-Catholic Know-Nothings violently attacked Irish Catholic immigrants and looted Irish homes, and threatened to attack local parishes. *See* IV *Encyclopedia of the History of St. Louis* 1917 (W. Hyde & H.L. Conard eds., 1899); Archdiocese of St. Louis, *1843-1903: The Immigrant Church*, http://bit.ly/1SsZ854. In 1870, the superintendent of Missouri's public schools called on the state legislature to propose a constitutional amendment that would prohibit the funding of non-public schools. *See* J. Michael Hoey, *Missouri*

Education at the Crossroads: the Phelan Miscalculation and the Education Amendment of 1870, 95 Mo. Hist. Rev. 372, 373 (2001). His call was explicitly anti-Catholic, criticizing New York's decision to fund Catholic schools and condemning those who "publicly assert the incompatibility of public schools and their church." *Id.* at 374.

The legislature complied, proposing Article IX, §8 in 1870. The Constitutional Convention convened in May 1875, nearly contemporaneously with President Grant's speech and Blaine's introduction of his amendment in the House of Representatives. *See* I *Journal: Missouri Constitutional Convention of 1875*, at 113 (I. Loeb & F. Shoemaker eds., 1920). As delegates debated the Blaine Amendment, the *New York Tribune* quoted a St. Louis newspaper in observing that, in the context of the debate over public funding of Catholic schools, "[t]he sign of the times all indicate an intention on the part of the managers of the Republican party to institute a general war against the Catholic Church." *N.Y. Trib.*, July 8, 1875, at 4 (quotation marks omitted). The Convention then approved Article I, §7 and Article IX, §8 nearly concurrently with Congress' consideration of the Blaine Amendment. *See* I *Journal: Missouri Constitutional Convention of 1875*, at 186-87, 194-95, 261; II *Journal: Missouri Constitutional Convention of 1875*, at 526, 596-97 (I. Loeb & F. Shoemaker eds., 1920).

The anti-Catholic origins of the Colorado and Missouri Blaine Amendment have manifested themselves in contemporary decisions of the Eighth Circuit and Colorado Supreme Court sanctioning—

indeed, compelling—discrimination against all religions. That these provisions "born of bigotry," *Mitchell*, 530 U.S. at 829 (plurality opinion), continue to give cover of law to discrimination against religion is reason enough for this Court to consider them, lay their ugly origins bare, and invalidate them. If there is any obstacle to doing so in this case, the Court should do so in *Douglas County*. But either way, the animus of the past cannot be allowed to continue to justify contemporary discrimination.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Eighth Circuit.

Respectfully submitted,

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